

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF VETERANS AFFAIRS

Gerald D. Bonnet,

Petitioner,

FINDINGS_OF_FACT,
CONCLUSIONS_AND
RECOMMENDATION

vs.

Norman County,

Respondent.

The above-entitled matter was submitted to Administrative Law Judge Peter C. Erickson upon a Stipulation of Facts and legal memoranda.

Karen K. Renshaw, Assistant Norman County Attorney, 318 East Main Street, Ada, Minnesota 56510, appeared on behalf of the Respondent, Norman County. The Petitioner, Gerald D. Bonnet, 322 4th Street S.W., Twin Valley, Minnesota 56584, appeared, pro se. The record on this matter closed on March 17, 1992, the date of receipt of the last written submission .

Notice is hereby given that, pursuant to Minn. Stat. P 14.61 the final decision of the Commissioner of Veterans Affairs shall not be made until this Report has been made available to the parties to the proceeding for at least ten days, and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to the Commissioner. Exceptions to this Report, if any, shall be filed with Bernie Melter, Commissioner, Department of Veterans Affairs, 2nd Floor, Veterans Service Building, 20 W. 12th Street, St. Paul, Minnesota 55155.

STATEMENT OF ISSUE

The issue to be determined in this proceeding is whether the Petitioner is entitled to be paid during the sixty-day notice period prescribed in Minn. Stat. P 197.46, even though he did not request a hearing on his discharge at any time during that sixty days.

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. (Stipulation) On November 13, 1990, the Petitioner, an honorably-discharged veteran, while employed by Norman County, was notified in writing that his employment would be terminated on November 30, 1990, based on willful misconduct and insubordination. On November 30, 1990, the Petitioner's employment with Norman County was terminated and Petitioner received salary and benefits through that date. On December 10, 1990, Petitioner received written notice from Jack Deitz, Norman County Auditor-Treasurer, that he had a right to request a hearing on his termination based on his status as a veteran. The Petitioner did not request a hearing on his termination any time within the sixty days, nor has he requested a hearing based on cause for termination any time since receiving notice. Norman County paid the Petitioner, on February 25, 1992, back pay representing the period from November 30, 1990, his last day of employment with Norman County, through December 10, 1990, the day he received a letter notifying him of his right to demand a termination hearing pursuant to the Minnesota Veterans Preference Act.

2. Gerald Bonnet filed a petition with the Minnesota Department of Veterans Affairs dated August 29, 1991, alleging that he was entitled to sixty days of additional payment from Norman County subsequent to receipt of the December 10, 1990 notice. That period runs through February 8, 1991.

3. On February 10, 1992, the Commissioner of Veterans Affairs issued a Notice of Petition and Order for Hearing which initiated this proceeding.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of Veterans Affairs have jurisdiction over this matter pursuant to Minn. Stat. §§ 14.50 and 197.481. The Department gave proper notice of the hearing.

2. The Petitioner, Gerald Bonnet, is an honorably-discharged veteran within the meaning of Minn. Stat. §§ 197.447 and 197.46, and is entitled to all the protections and benefits of the Veterans Preference Act.

3. Norman County is a political subdivision of the state of Minnesota within the meaning of Minn. Stat. § 197.46.

4. For the reasons set forth in the Memorandum below, the Administrative Law Judge concludes that Gerald Bonnet is entitled to be paid for the sixty-day period from December 10, 1990 through February 8, 1991. Pre-judgment interest

must be paid from the time each payment was due. Henry_v._MWCC, 401 N.W.2d 401 (Minn. App. 1987).

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS RESPECTFULLY RECOMMENDED that the Commissioner of Veterans Affairs issue an order awarding the Petitioner the amount of money he would have earned had he been employed by Norman County from December 10, 1990 through February 8, 1991, with pre-judgment interest.

Dated this 20th day of March, 1992.

_____/s/_____

PETER C. ERICKSON
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

Reported: Submitted on Stipulated Facts.

MEMORANDUM

Minn. Stat. § 197.46 prohibits the removal of a veteran from public employment except for incompetency or misconduct shown after a hearing, upon due notice and upon stated charges in writing. The statute goes on to provide:

Any veteran who has been notified of the intent to discharge the veteran from an appointed position or employment pursuant to this section shall be notified in writing of such intent to discharge and of the veteran's right to request a hearing within 60 days of receipt of the notice of intent to discharge. The failure of a veteran to request a hearing within the provided 60-day period shall constitute a waiver of the right to a hearing. Such failure shall also waive all other available legal remedies for reinstatement.

Case law uniformly holds that, pending a discharge hearing, a public employer must continue to pay a veteran who is no longer working but awaiting a determination from a hearing board. Lewis_v._Minneapolis_Board_of_Education,

408 N.W.2d 905 (Minn. App. 1987); *Mitlyng v. Wolff*, 342 N.W.2d 120 (Minn. 1984); *Kurtz v. City of Apple Valley*, 290 N.W.2d 171 (Minn. 1980); *Johnson v. Village of Cohasset*, 116 N.W.2d 692 (Minn. 1962).

The issue presented herein has not really been addressed by the Minnesota courts. The Respondent contends that policy considerations mandate that a veteran should not be entitled to a sixty-day salary windfall absent a challenge to the legal sufficiency of the grounds for discharge. The Administrative Law Judge is of the opinion that both the Veterans Preference Act and case law require otherwise.

Minn. Stat. § 197.46 clearly states that a veteran must be notified of an "intent to discharge and of the veteran's right to request a hearing within sixty days of receipt of the notice of intent to discharge." (Emphasis added.)

The veteran need not request a veterans preference hearing from the employer until the sixtieth day of the notice period. It is not until after the sixty days expires that a waiver of the right to a hearing occurs. Because the Legislature carefully worded the statutory notice to be an "intent" to discharge and the right to a discharge hearing exists until the sixtieth day has elapsed, these provisions must be interpreted as

The Judge points out that veteran-employees have rights pursuant to the Veterans Preference Act that non-veteran employees do not have with respect to continued payment after the public employer has made a decision to discharge. If a non-veteran employee is dismissed, he/she is usually entitled to a hearing on the discharge but the employer has no obligation to continue to pay the employee unless the discharge is invalidated. In that case, backpay is awarded. With respect to a veteran-employee, the employer must continue to pay the employee through the time of the hearing and the veteran is entitled to that payment regardless of the outcome of the hearing. Even if the discharge was justified, the veteran-employee must be paid until his rights are exhausted. This applies whether a hearing is held or a statutory waiver becomes effective on the sixty-first day. Although there is no case on point, some light is shed on the issue herein by the cases discussed below.

In *Kurtz*, supra, the court summarized previous decisions concerning the difference between the disciplinary suspension of a veteran and the suspension of a veteran pending a discharge hearing. The court stated that the cases ". . . establish that (1) a suspension without pay pending discharge proceedings is illegal; (2) a suspension with pay pending discharge proceedings is permissible; and (3) a disciplinary suspension without pay is permissible." 290 N.W.2d at 173. In the case of *Leininger v. City of Bloomington*, 299 N.W.2d 723 (Minn. 1980), the court held that a veteran may not be suspended without pay pending a determination of the charges filed against him citing *Johnson v. Village of Cohasset*, 116 N.W.2d 692, 700 (Minn. 1962). 299 N.W.2d at 731.

This position was strengthened in *Mitlyng, supra*, wherein the court held that "

. . . When a suspension without pay occurs while a discharge proceeding is pending . . . the practical effect is to accelerate the discharge before a hearing, and under such circumstances the suspension, to the extent it purports

to be without pay, is contrary to the Veterans Preference Act and is invalid."

342 N.W.2d at 123.

The Judge has concluded that these holdings apply equally to this fact situation; when a veteran does not exercise his right to a hearing within the sixty-day period. Legally, a discharge proceeding is "pending" as the result of an "intent" to discharge notice given to a veteran during the entire sixty days. To stop paying the veteran at any time during those sixty days would effectuate the discharge prematurely. That result is neither the intent nor the purpose of Minn. Stat. § 197.46. The Judge has thus determined that Mr. «Bonnet is entitled to sixty days of pay from Norman County for the period December 10, 1990 through February 8, 1991.

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